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Office of the Legal Adviser

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COMMENTS:

United States Department of State

Washington, D.C. 20520

July 17, 1969

Dear Mr. Chairman:

I understand that on Friday the Senate deleted sections 111 and 112 from S. 1160 and agreed to consider a substitute section 111 offered by Senator Moynihan. The substitute language would apply to U.S. laws enacted on or after the date of enactment of this act, which prohibit all U.S. assistance, or all assistance under a specified account, to any specific foreign region, country, government, group or individual. The provision would impose criminal penalties on U.S. Government employees who solicit the provision of funds or material assistance by any foreign or domestic entity, and prohibit the provision of U.S. assistance to any third party, if the funds or assistance would have the purpose or direct effect of furthering or carrying out the "same or similar activities" for which assistance is prohibited. Furthermore, this provision can be superseded only by a provision of law that specifically repeals, modifies or supersedes it.

While we appreciate Senator Moynihan's willingness to consider modifications of his previous proposals, the new section 111 is still unacceptably vague, impossible to administer, and an impermissible intrusion on the President's constitutional prerogatives. Such a provision is unnecessary to achieve compliance with statutory limitations on spending. Moreover, it would have a serious detrimental effect on the conduct of U.S. diplomacy and the administration of U.S. assistance programs, and would unfairly expose U.S. officials to potential criminal liability in cases where they would have no reason to believe that their conduct was unlawful. The Administration is strongly opposed to the new section; we would recommend that the President disapprove the bill if this provision is included in final passage.

The proposed amendment is essentially an attempt to prescribe to future Congresses what consequences should flow from any prohibition on assistance which they may choose to adopt. It is an attempt to convert all future assistance prohibitions into criminal statutes which encompass a wide range of actions other than the provision of assistance to the

The Honorable
 Claiborne Pell,
 Senate Foreign Relations Committee

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country in question. There is absolutely no need for such a provision. U.S. assistance programs are already subject to the Anti-Deficiency Act and a host of other legislative and regulatory provisions. If in a particular future case Congress wishes to adopt additional measures or to expand the scope of a prohibition in a particular case, it should consider such actions in light of the specific circumstances it may be dealing with at that time. Each Congress should craft its own solutions, and not be hampered by the need specifically to undo prior sweeping measures such as the current proposed amendment.

Furthermore, the language of the proposed amendment is extremely vague and would be virtually impossible to administer. It refers, for instance, to assistance to a third party or solicitation of funds where the "purpose or direct effect" would be to further or carry out "the same or similar activities . . . for which United States assistance is prohibited." But statutory prohibitions on assistance usually do not specify a series of activities for which assistance is prohibited, and as a result the proposed amendment could be interpreted to apply to all activities for which U.S. assistance could have been provided but for the prohibition. This would include virtually all forms of economic activity in the country in question, as well as most forms of military, political and governmental activity.

-- The result would be to sanction -- in some instances with criminal penalties -- any encouragement by U.S. Government officers or employees (including members of Congress) of any assistance by anyone for virtually any activities in the specified country, and any U.S. assistance to a third country which has the direct effect of furthering any such activities. This would severely inhibit any dialogue with governmental or business leaders of such a country, and in the case of assistance to other countries, it would be almost impossible to determine whether any particular assistance would have the effects prohibited. For example, economic assistance of any significance to a neighboring country could have a direct stimulating effect on economic activity in the country to which aid is prohibited.

As a result, this proposed amendment could have many undesirable results probably not intended by its sponsor. For instance:

-- The Annual Foreign Operations Appropriations Act typically includes a prohibition (e.g., section 530 of the 1989 Act) on all assistance to a series of countries, including Angola and Cambodia. Significant economic aid to a country bordering any of these could well have a direct stimulating effect on economic activity in the named country, and accordingly could be seen as violating the proposed amendment.

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-- The 1989 Foreign Operations Appropriations Act prohibits all assistance to the Noriega regime in Panama. If that were reenacted in a later year, the proposed amendment could be interpreted to mean that we could do nothing that would have a direct stimulating effect on economic activities in Panama so long as Noriega is in control. Yet the United States obviously engages in activities that have exactly that effect -- most notably through our involvement in the operation of the Canal and our maintenance of U.S. forces in Panama.

-- The Foreign Assistance Act prohibits assistance to a group of Communist countries (including Poland and Hungary). If the pending International Cooperation Act of 1989 -- which effectively reenacts the Foreign Assistance Act in modified form -- is enacted into law, any attempt to encourage economic development in those countries through others would be prohibited. We would, for instance, have to distance ourselves completely from the effort to promote development in Poland.

Most important, this proposed amendment would seriously impair the President's ability to carry out his Constitutional responsibility to conduct relations with foreign governments and to administer U.S. assistance programs. In effect, it would constitute a pervasive regulation of the conduct of diplomatic conversations, which would be under the constant shadow of the possible imposition of criminal or civil liability if later deemed to further some prohibited activity or to have some prohibited effect. This would apparently be so, moreover, even in the absence of any specific intent on the individual's part to violate the law. The same danger would be present in the administration of foreign assistance programs and sensitive intelligence contacts. These are matters assigned by the Constitution to the President, and Congress cannot, and should not, attempt to hamstring the President with such overreaching and inappropriate prohibitions. (These constitutional aspects are dealt with at greater length in the June 20 letter of the Justice Department.)

In closing, I would simply state that the Secretary and I are fully mindful of the concerns behind this proposal. You can be confident that even if there were no prohibitions on the books against the use of indirect means to take illegal actions, this kind of activity on the part of Administration officials would never arise. By working together we can accomplish much more than would result from imposition of legislation that so threatens the proper role of the executive.

Sincerely,

Lawrence E. Eagleburger
Lawrence E. Eagleburger

IRAN-CONTRA PROVISION

-- Moynihan substitute section 111 (replacing 111/112) would:

- o Impose criminal penalties on U.S. Government employees who solicit the provision of funds or material assistance by any foreign or domestic entity and

- prohibit provision of U.S. assistance to third party

- if funds or assistance would have purpose or direct effect of furthering or carrying out "same or similar activities" for which assistance is prohibited by U.S. law.

- o Apply to new U.S. laws (enacted on or after date of this act), which prohibit all U.S. assistance, or all assistance under a specified account, to any specific foreign region, country, government, group or individual;

-- Appreciate Senator Moynihan's willingness to consider modifications of previous proposals but substitute still raises many of previous concerns.

- o Administration strongly opposes substitute; would recommend President disapprove bill if this provision included.

- o Such prohibitions are not needed to address the apparent concerns behind the provision. We are not in the business of using indirect means to circumvent prohibitions.

-- Proposed provision is extremely vague and overbroad.

- o Statutory prohibitions on assistance usually do not specify activities covered; in such a case, this provision could be interpreted to cover all activities in the specified country for which U.S. assistance might have been provided.

- o This would sanction - in some cases with criminal penalties - any encouragement by U.S. government officers or employees (including members of Congress) of any assistance for virtually any activity in a specified country, and any U.S. assistance to a third country which has the direct effect of furthering any such activities.

- o For example, almost any significant economic assistance to a neighboring third country could have a direct stimulating effect on economy of named country.

- o Could have many unintended results or could inhibit appropriate behavior, of particular concern where personal criminal liability is at stake:

- Annual Foreign Operations Appropriations Act typically includes prohibition on all assistance to series of countries, including Angola and Cambodia (sec. 550 of 1989 Act). Significant economic aid to bordering country could well have direct effect on economy of named country, and thus be viewed as violation.

- 1989 Foreign Operations Appropriations Act prohibits all assistance to Noriega regime in Panama. If reenacted in subsequent years, could mean U.S. could do nothing that would stimulate Panama economy while Noriega in control. Yet U.S. heavily engaged in such activities -- e.g., Panama Canal and maintenance of U.S. forces in Panama.

- Foreign Assistance Act prohibits assistance to group of Communist countries (including Poland and Hungary). If pending International Cooperation Act of 1989 is enacted (which effectively reenacts FAA in modified form), any attempt to encourage economic development in those countries through others would be prohibited. For example, we would have to distance ourselves completely from effort to promote development in Poland.

- Amendment attempts to prescribe to future Congresses consequences of prohibition on assistance. In effect, it imposes sweeping criminal sanctions on every future assistance prohibition.

- o In future cases Congress should decide in light of specific circumstances whether to expand scope of prohibition.

- o Each Congress should craft its own solutions, and not be hampered by the need specifically to undo prior sweeping measures such as current proposed amendment.

- Amendment would seriously impair President's ability to carry out his constitutional responsibilities.

- o Constitutes pervasive regulation of conduct of diplomatic conversations, under shadow of possible criminal or civil liability.

- o Same as to administration of foreign assistance programs and sensitive intelligence contacts.

- o These matters are assigned to the President by the Constitution, and Congress should not attempt to intervene with such overreaching and inappropriate prohibitions.